LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
NOV 30 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., et al.,

Petitioners

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONERS

WILLIS F. DANIELS
HAROLD W. SWOPE
DONN L. SNYDER,
232 North Second Street,
Harrisburg, Pennsylvania
Attorneys for Petitioners

INDEX

		Page
1.	The 1953 Hearing Record is not Properly Before the Court.	1
2.	The 15% Limitation Does Not Validate the Contested Provisions.	3
3.	Size of the Market and the Intermingling of Regulated and Unregulated Producers and Handlers Do Not Validate the Contested Provisions.	4
4.	The Secretary's Findings were Challenged by Respondents from the Outset of this Litigation.	6
5.	The Provisions are Neither Incidental nor Necessary to Effectuate the Purposes of Sections 8c(5) (A), (B) and (C).	6
6.	The Unconstitutionality of the Secretary's and Circuit Court's Interpretation of Sections 8c(7) (D) is properly raised.	7
7.	The Challenged Provisions are not Essential to a System of Regional Regulation.	8
8.	The Contested Provisions are not Authorized under the Doctrine that they Constitute "Customary Differentials" under Section 8c(5)(A)(1) of the Act.	9
9.	Non-Pool Plants Neither Represent a Proper Classification nor Are They Accorded Uniform Treatment Under the Contested Provisions.	10
10.	The Provisions in Issue Are Not Required on the Basis of Administrative Feasibility.	12

Page

11. The Invalidity of the Contested Provisions under Section 8c(5)(G) is Clear and Was Raised by Petitioners in the First Stage of this Litigation. . . 12

12. Petitioners are not Estopped from Contesting these Provisions by any Election Made by Them. 14

13. Congressional Inaction Establishes the Doctrine of the Kass Case as the Correct Interpretation of the Intent of Congress Concerning the Contested Provisions. 15

CITATIONS

Cases

Green Valley Creamery v. United States, 108 F. 2d 342 9

Miscellaneous

Study of the Dairy Industry, Hearings Before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Session 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., et al.,

Petitioners

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONERS

Certain errors of interpretation and omissions in Respondents' Brief in this case require reply by Petitioners. A careful attempt will be made to avoid restatement or elaboration of any arguments presented by Petitioners in their main brief.

(1) The 1953 Hearing Record is not Properly Before the Court.

The Respondents make reference to the record of an administrative hearing held in 1953 in which "the entire

subject of compensatory payments was extensively considered . . . " (Resp. Brief P. 23) That record, it is argued, along with the record developed at the 1957 hearing "clearly establish the need for partial regulation of non-pool handlers who sell in the marketing area". Furthermore, the claim is made that the records of those hearings justify the "particular form of regulation which the Secretary has selected". Although reference is made to Petitioners' objection to the introduction of the 1953 hearing record into the administrative hearing in the present case, they neglect to state that the objection was sustained by the Hearing Officer. The compensatory payment provisions here under attack are based on the record of the 1957 hearings, when Northern New Jersey was included in the Order No. 27 Marketing Area for the first time. The 1953 proceedings and the record incident thereto were neither offered nor made a part of the 1957 Promulgation hearing record, and are not in the record now before the Court. Respondents have no basis upon which to assert that the 1953 hearing record contains matters relevant to the present controversy, nor that it justifies the particular form of compensatory payment which the Secretary has imposed upon Petitioners.

In 1953, Petitioners, since they sold no Class I milk in the Marketing Area, were not affected by any of the provisions of Order No. 27, and would have had no standing to appear at those hearings either in support or opposition to any of its provisions. Certainly Petitioners could not have made any attack in this or any other proceeding against the legality of the compensatory payment provisions of Order No. 27 prior to August 1, 1957, since they were in no way aggrieved by them. The 1953 hearing record, having neither been offered nor introduced into the 1957 hearing, and Petitioners having no right to attack the compensatory payment provisions of Order No. 27 prior to 1957, Petitioners objected to its introduction into the administrative hearing by which this litigation was begun. The Hearing Officer properly sustained Petitioners'

objections and the 1953 hearing record, whatever it may contain pertaining to the compensatory payment provisions of Order No. 27 at that time, is not a part of the record which must now be considered by this Court. Its contents are unknown in this case, and Respondents' reliance upon it is unwarranted and improper.

(2) The 15% Limitation Does Not Validate the Contested Provisions.

Respondents refer to that portion of Section 927.83 of Order No. 27 (R. 879a) which provides that no compensatory payments are required "for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15% of the combined volume of the Class I-A and Class II milk used in such computation. . . ". They conclude from this that the Secretary imposes compensatory payments upon non-pool handlers "only when there is a displacement of pool milk by non-pool milk". In fact, since August 1, 1957, the date upon which Northern New Jersey was included in the Order No. 27 Marketing Area, there has never been a month during which the volume of Class III milk in the market was less than 15% of the combined volume of the Class I-A and Class II milk. On the contrary, the Class III volume in the months of least production has been approximately double that amount since 1952 and the most recent figure for September, 1961, shows the Class III volume at 41.25% of the total volume. Respondents' argument has no connection whatsoever with the realities of the level of milk supply in the market. Respondents' position actually is that any sale of Class I milk in the marketing area by a non-pool handler is a displacement of pool milk by non-pool milk and should, therefore, be prohibited. They are willing to press this position, even though Petitioners would be deprived of Class I sales made by them in this market for more than 20 years. The 15% provision by no

means changes the nature of the compensatory payment demanded from penalty to compensation. Its introduction into Order 27 was nothing more than a spurious attempt to comply with the holding in the *Kass* case in a manner designed to be ineffectual, inoperative and meaningless.

Respondents refer to the Secretary's "careful consideration" of the various proposals pertaining to peripheral milk and his selection of the present provision as "the *only* fair and feasible solution". (Resp. Brief P. 26-30) The Secretary's Findings of Fact in support of the compensatory payment provisions here involved neither state nor imply that the provision adopted was the *only* fair and feasible solution. His Findings on this point are nothing more than an attempt to justify the total exclusion of all non-pool milk from the large New York-New Jersey Class I milk market.

(3) Size of the Market and the Intermingling of Regulated and Unregulated Producers and Handlers Do Not Validate the Contested Provisions.

Respondents cite the principal that compensatory payment provisions may vary with local economic circumstances, and in less "complex" milk sheds where pool and non-pool handlers are geographically separated and not in competition for farmers, a compensatory payment differing from the one here at issue might be justified. The contention that the type of compensatory payment is related to the size and intermingling of producers in a given milk marketing area, lacks force when it is realized that the Secretary has used at least five different compensatory payment provisions in various orders throughout the country without regard to these factors.

In approximately twenty-five Orders, there is no provision for compensatory payments whatsoever. This group includes *Chicago* and *Philadelphia*, both of which markets

are large, similar to the market here involved, and served by competing farmers and competing regulated and unregulated handlers. In another category there are at least eleven orders which contain provisions for a compensatory payment measured by the difference between the Class I or fluid price and the uniform market price. The *St. Louis* milk marketing area is included within this group. It must be conceded that the St. Louis market is also large and one in which there is close geographical proximity between regulated and unregulated milk handlers and their producers. In still another group, the non-pool handler has an option to pay the difference between the Class I and manufactured price on Class I sales in the area to the marketwide Equalization Fund, or the plus difference between the value of the milk received at his plant computed as if such plant were regulated under the Order and the gross payments actually made by the handler. There, if the gross payments are equal to or higher than the value computed under the Order price, the handler is not required to make any payments. Typical of this group is the Southern Michigan Order, which encompasses the area of *Detroit,* also a large and intermingled market.

The size of the New York-New Jersey Milk Marketing Area and the intermingling of regulated and unregulated handlers in it neither supply legal justification for the type of compensatory payment incorporated in Order No. 27 nor demand it. The law requires that any compensatory payment device must conform to the standard of uniform treatment of all handlers who supply the market with Class I milk. Anything short of this produces the discrimination proscribed by the statute. Without exception it is agreed that milk is available to non-pool handlers, such as Petitioners, only at prices in excess of the Order No. 27 blend or average market price. Addition of the compensatory payment demanded of Petitioners thus produces the non-uniformity in the treatment of pool and non-pool handlers, both of whom supply the same market with Class I

milk, which renders the provision invalid and repugnant to Section 8c(5) of the Act, regardless of the size of the market.

(4) The Secretary's Findings were Challenged by Respondents from the Outset of this Litigation.

Respondents assert that Petitioners failed to challenge the Secretary's Findings and conclusion that the contested compensatory payment provisions are authorized by Section 8c(7)(D) of the Act. An examination of the Petitioners' pleadings, both in the administrative proceeding under Section 8c(15)(A) and the Petition of Appeal under Section 8c(15)(B), demonstrates the error of this contention. In the administrative petition, Petitioners objected to the Secretary's Finding that handlers and producers under Order No. 27 carry the surplus for the Class I sales in the market made by Petitioners and those similarly situated. It was also pointed out that the Secretary erred in failing to recognize that Petitioners paid prices far in excess of those paid producers by pool handlers and that the challenged provision not only discriminates against Petitioners and other non-pool handlers but is unnecessary to protect the status of the pool. In the subsequent Bill of Complaint, filed under Section 8c(15)(B), to review the Secretary's decision on the administrative proceeding, Petitioners reiterated these allegations of error, so that from the outset the Findings of the Secretary were challenged at every point by Petitioners. There is no basis for the assertion that Petitioners can be assumed to have acquiesced in any of the Secretary's Findings by virtue of a failure to contest or deny them.

(5) The Provisions are Neither Incidental nor Necessary to Effectuate the Purposes of Sections 8c(5)(A), (B) and (C).

The argument is made by Respondents that the provisions in question are both incidental and necessary to

effectuate the pool system authorized by Sections 8c(5)(A), (B) and (C), and that being auxiliary to these provisions, are authorized by Section 8c(7)(D). Petitioners have pointed out in their main brief that the compensatory payment provisions of the Order are inconsistent with Sections 8c(5)(A) and (B) and are invalid for that reason alone. However, the record of the 1957 promulgation hearing demonstrates that the provisions are not only inconsistent with 608c(5)(A) and (B), but are in fact neither incidental nor necessary to effectuate the pricing system established by those sections. In view of the uncontested fact that milk is not available to Petitioners at the Class III price established in Order No. 27, a provision which imposes a compensatory payment of the difference between the Class I and Class III prices in the Order is, contrary to the statute, "unnecessary" and "not incidental" to the clear purpose of maintaining uniformity of regulation of all handlers and producers who supply the New York-New Jersey Milk Marketing Area.

(6) The Unconstitutionality of the Secretary's and the Circuit Court's Interpretation of Sections 8c(7)(D) is properly raised.

Respondents object to Petitioners' argument that if the contested provisions are construed to be authorized solely by Section 8c(7)(D), such construction would result in an unconstitutional delegation of legislative power to the Secretary, since the power would then not be accompanied by the necessary standards to guide the Secretary in the use of it. The objection is that Petitioners' argument was not made below and is, therefore, not properly before the Court. This is a misconception of Petitioners' contention. No attack is made upon the constitutionality of Section 8c(7)(D). The attack is made only upon the interpretation placed upon it by the Secretary and the Court below. At the inception of this litigation, Petitioners alleged in

their administrative petition that the Secretary's issuance of the amendments in question was unconstitutional, illegal and in violation of the Marketing Agreement Act of 1937, as amended. (R. 13a, 21a, 30a, 37a-38a). Again, in the Bill of Complaint, filed by Petitioners in the review proceeding under Section 8c(15)(B) of the Act, the action of the Secretary was alleged to be in violation of the Constitution of the United States. (R. 148a, 160a). Finally, even if the constitutionality of the interpretation of Section 8c(7)(D) by the Secretary and the Court below had not been raised heretofore, that issue could properly be brought before the Court at this stage of these proceedings. Respondents' argument that the constitutional question is not properly raised is without substance.

(7) The Challenged Provisions are not Essential to a System of Regional Regulation.

Great weight is attached by Respondents to the argument that Petitioners' position is in conflict with the statutory mandate that the regulatory system under the Act be established on a regional basis. It is contended that regionality would thereby be destroyed and every handler and producer in the United States would become fully regulated under a single nationwide milk order. This is neither the intended result nor the logical conclusion derived from Petitioners' position. Congress intended that the regulation of milk prices should be achieved on a regional basis and that the Order for each region should reflect the conditions pertaining to that area. All handlers who dispose of Class I milk in a given area, and the producers who supply that milk, were to be required to comply with uniform rules and regulations, so that insofar as the sales within a given area were concerned, there should be no discrimination among the handlers and producers who supply and market the Class I milk involved. The Secretary was authorized to issue different sets of rules and regulations in the various

regional marketing areas. Once issued, however, he was directed to make them applicable in a uniform manner to those who produce and market the milk. (Pet. Brief, P. 26)

This theory of regionality is consistent with the historical and traditional manner in which milk is marketed. For example, since 1934, regulation of milk prices in Pennsylvania, under the Pennsylvania Milk Control Law, has functioned in this same manner. Within the state, there are thirteen milk marketing areas, for which specific minimum milk prices are established. For any milk sold by any milk dealer in Pennsylvania in any of the areas, his obligation to producers is fixed by the minimum producer and resale prices prescribed in the Order applicable to the area in which the milk is sold.

Petitioners' position in this case is thoroughly consistent with the Congressional direction that price regulation under the Agricultural Marketing Agreement Act be carried out on a regional basis. The provisions of Order No. 27 can and must be made uniformly applicable to all sales of Class I milk in the area in which it is sold.

(8) The Contested Provisions are not Authorized under the Doctrine that they Constitute "Customary Differentials" under Section 8c(5)(A)(1) of the Act.

Respondents point out that in the case of *Green Valley Creamery v. United States*, 108 F. 2d 342, two sets of minimum prices were authorized in the Order applicable to the Greater Boston Marketing Area: one where purchases of milk were made from an association of producers and the other for purchases from producers who were not members of the Association. The Court in that case affirmed the Order of the Secretary under the terms of Section 8c(5)(A)(1) which authorized establishment of uniform prices to all producers for milk delivered to all handlers, subject only to adjustments for "(1) volume, market, and production differentials *customarily applied by the hand-*

lers subject to such order. . ." (Emphasis supplied) The Court found that the differentials there in question were those which had been customarily applied and were thus specifically authorized by the language of the statute. At page 345 of the decision, the Court held:

> ". . . In promulgating the Order the Secretary of Agriculture found as a fact, upon evidence introduced at the administrative hearings, 'that the differential in prices to associations of producers, and producers, is justified as a reasonable allowance for services actually performed by associations of producers'. It is not denied that there was evidence before the Secretary warranting a finding that such a differential *had customarily been applied in the market area*, for the reason that milk purchased from associations of producers has an enhanced value due to the fact that many marketing services have already been performed by such associations. In view of these facts, we think that the Government is right in its contention that this differential in prices applicable to milk received from producers and milk received from associations of producers is authorized by Section 8c(5)(A)(1) of the Act as a market differential customarily applied by handlers. . . ." (Emphasis supplied)

The doctrine of the *Green Valley Creamery* case, supra, has no application to the present issues. There is no allegation, nor could there be, that the compensatory payment provisions of Order No. 27 represent a "customary differential", in existence in the market prior to the enactment of the Agricultural Marketing Agreement Act and the promulgation of Order No. 27.

(9) Non-Pool Plants Neither Represent a Proper Classification nor Are They Accorded Uniform Treatment Under the Contested Provisions.

It is contended by Respondents that the Secretary has authority to impose upon non-pool plants pricing require-

ments which differ from those pertaining to pool plants on the theory that the uniformity requirement of the statute refers "to all handlers who occupy the same position" and that non-pool plants represent a "proper classification". It is contended, further, that all non-pool handlers are treated alike and that whatever uniformity is required under Section 8c(5)(A) has thus been accorded.

Petitioners do not concede that the Secretary has authority to impose non-uniformity upon any handlers by classification, and certainly the classification of "non-pool" handlers is too sweeping to be reasonable. Non-pool handlers fall into three principal categories: (a) handlers regulated by some other Federal Order; (b) handlers regulated by a State agency which fixes prices to be paid producers for milk sold within the State and without the State; (c) handlers regulated by neither Federal nor State Orders. The impact of the compensatory payment provisions involved in this case is different as it applies to the three groups. No compensatory payments are required of some of these handlers; minimal payments may be required of others; and the maximum compensatory payment that can be levied by reason of the compensatory payment provision has been imposed upon the Petitioners. The Petitioners are subject to the rules and regulations of the Pennsylvania Milk Control Commission, and in the case of Lehigh Valley, to Federal Order No. 61 as well. As has been pointed out in Petitioners' brief in chief and elsewhere in this brief, the Pennsylvania Milk Control Commission establishes Class I prices substantially higher than those under Federal Order No. 27 or any other Federal Orders in the proximity of Federal Order No. 27. It is thus apparent that there is an absolute lack of uniformity in the application of the compensatory payment provisions of Order No. 27 to non-pool plants and that the Secretary has made no attempt at the establishment of uniformity on the basis of classification, proper or improper.

(10) The Provisions in Issue Are Not Required on the Basis of Administrative Feasibility.

It is contended that the present compensatory payment provision is the only method available to the Secretary, since determination of the actual costs of milk to a non-pool handler would be impossible. The record in this case shows that the Market Administrator has the authority and does in fact demand of Petitioners full disclosure of all the facts pertaining to the handling of their milk and can determine the prices paid therefor as well as its disposition. These reports are filed monthly and are subject to full audit and verification by the Market Administrator's staff. There is no greater burden imposed upon the Market Administrator in securing information concerning the handling of milk by non-pool plants than there is in the case of pool plants. The Administrator has been able to secure this information regularly and accurately from August 1, 1957, the effective date of the extension of Order No. 27. Furthermore, administrative feasibility is not a factor which the Courts may take into consideration to alter or amend a statute where the intention of Congress is clearly expressed. Even if that were possible, no such question is here involved.

(11) The Invalidity of the Contested Provisions under Section 8c(5)(G) is Clear and Was Raised by Petitioners in the First Stage of this Litigation.

Petitioners contend that the compensatory payment provisions in issue violate Section 8c(5)(G) of the Act, since they prohibit the marketing of Petitioners' milk in the New York-New Jersey Milk Marketing Area. Respondents argue that this contention was not raised in the administrative proceeding under Section 8c(15)(A) by Petitioners and that, therefore, it is not properly before the Court. In fact, Petitioners alleged in the administrative petition that the Secretary's action establishes internal tariffs or

barriers interfering with the free flow of milk, in violation of the specific provisions of the Agricultural Marketing Agreement Act and the Constitution of the United States. (R.-19a, 35a, 144a, 147a, 155a, 158a) Respondents claim Petitioners do not contend that the compensatory payment provisions completely preclude the entry of all such milk. This is a total misconception of the Petitioners' position on this point. In their brief, at page 48, the Petitioners' position is stated as clearly as possible where the following language appears:

> "In the present case the disparity in prices is many times more aggravated than in the *Kass* case, and prohibits the entry of milk into the marketing area in direct violation of 8c(5)(G) of the Act."

Petitioners not only contend that the provisions under attack prohibit the flow of milk into the area, but actually drive handlers with long-established sales and distribution out of the marketing area.

The Secretary has created a situation where New York-New Jersey pool handlers have a monopoly over all Class I sales in this vast metropolitan area by exclusion of all non-pool handlers. On the other hand, non-pool handlers have no such preferred status against the invasion of pool handlers in the markets where they sell most of their Class I milk. Order No. 27 pool handlers whose minimum class prices under Order No. 27 are less than those imposed upon Petitioners by the Pennsylvania Milk Control Commission are able to market Class I milk in the Allentown-Easton-Bethlehem area at a competitive advantage over Petitioners. Thus, we have a group of pool handlers who demand exclusive rights to sell milk in the New York-New Jersey Milk Marketing Area but would under no circumstances give up their rights to sell Class I milk at an advantage in competition with non-pool plants in their areas of principal distribution. The monopoly features of this controversy are glaringly apparent.

(12) Petitioners are not Estopped from Contesting these Provisions by any Election Made by Them.

Respondents contend that Petitioners' election of non-pool status precludes them from questioning the validity of the compensatory payment provisions of the Order. Petitioners' position on this issue has been stated in the main brief. The use of the election or option device was a clear maneuver on the part of the Secretary to preclude adjudication of Petitioners' fundamental legal rights in this litigation. Under all the circumstances, it is clear that the option offered Petitioners was an empty right.

In support of the position taken by Respondents, their brief cites five cases at page 57. In each of these cases, the Plaintiff was given an option to remain outside the regulatory provisions of the statute in question, or place himself under its jurisdiction voluntarily to gain its benefits. In each instance, Plaintiff elected to use the statute, and thereafter sought to question its validity, and in each instance, the Court decided against the Plaintiff. None of these cases has application to the present controversy. Petitioners were placed under the regulatory plan of Order No. 27 involuntarily and without their acquiescence. At the very most, they were subsequently afforded a choice as between two types of regulation. In the case of Lehigh, even this form of election was not available from August 1, 1957 to September 1, 1958, and it is not established in the record that Lehigh's percentage of Class I sales thereafter was high enough to afford it pool plant status even if it had so elected.

Respondents imply that Lehigh voluntarily changed its method of operation on July 1, 1957 for the specific purpose of becoming ineligible for pool plant status under Order No. 27. The record negates this contention. (R. p. 324a) In fact, Lehigh, by July 1, 1957, completed a long standing plan to secure certain local health certificates for its pro-

ducers so that milk might be shipped directly from its plant for ultimate distribution in the entire Philadelphia market. Such shipments began on July 1, 1957, and as a result Lehigh became a handler fully regulated under the Philadelphia Order. This precluded pool plant status under Order No. 27 from August 1, 1957 until September 1, 1958, the date upon which Order No. 27 was amended.

We do not have in this instance, as in the cases cited by Respondents, a situation where Petitioners have availed themselves of the benefits of a statute and now contest its validity. At no stage in the operation of Order No. 27 have Petitioners had a vountary choice which would have produced the estoppel contended for by Respondents.

(13) Congressional Inaction Establishes the Doctrine of the Kass Case as the Correct Interpretation of the Intent of Congress Concerning the Contested Provisions.

Respondents contend that Congressional inaction in the face of the widespread use of compensatory payment provisions in Milk Marketing Orders generally, supports their contention that the provisions here attacked are valid. Congressional inaction, in this regard, rather than lend weight to the Respondents' position, supports Petitioners' contentions. Congress stated clearly the purposes and objectives of the Agricultural Marketing Agreement Act, and the standards in accordance with which the Secretary was authorized to achieve them. By inaction, after a hearing before the Subcommittee on Dairy Products, of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Session, Congress has acknowledged that the Opinion in the *Kass* case correctly interprets the Congressional intent regarding the uniformity standard. There is no need to amend the statute. Congress has already de-

clared that price-fixing under the statute must be uniform both as to handlers and producers.

Respectfully submitted,

WILLIS F. DANIELS,
HAROLD W. SWOPE,
DONN L. SNYDER,
232 North Second Street,
Harrisburg, Pennsylvania,
Counsel for Petitioners.